Min Tat J. held that the court cannot interfere with the right of the Dewan Ra'ayat to decide the question of the plaintiff becoming disqualified from membership and the relief sought by the plaintiff was outside the jurisdiction of the court.

The present case is distinguishable in that the facts are different, a question has not arisen in the Dewan and that the decision of the court was not made with a view to preventing the Dewan from exercising its powers and privileges, or to disqualify the applicant if it is mindful to do so.

Lastly, it was argued that the sentence imposed by the court on the appellant was an infringement of Article 8 of the Federal Constitution, by reason that such sentence would result in his disqualification as member of Dewan Undangan Negeri whereas others who do not belong to the same class of persons as he would suffer only a fine.

To this argument I would only refer the learned counsel for the appellant to a passage in the book by Tun Mohamed Suffian entitled 'An Introduction to The Constitution of Malaysia' at p. 213 in which he says:

"Article 8 by clause (1) provides that all persons are equal before the law and entitled to its equal protection.... Today there is complete equality before the law, save as excepted by the constitution, and no Raja, Tengku, Tun, Tan Sri, Datuk or towkays may claim special treatment in the courts by reason of position or wealth."

In emphasising the same principle Raja Azlan Shah J. (as he then was) in *Public Prosecutor* v. *Tengku Mahmood Iskandar & Anor.*[12] referring to Article 8 said:

"That implies that there is one kind of law in the country to which all citizens are amenable. With us, every citizen, irrespective of his official status, is under the same responsibility for every act done without legal justification."

In the eyes of the court the applicant had committed a criminal offence and he was convicted, irrespective of his official status. In passing sentence on him the court must have a specific purpose in mind that is the public interest. The interest of justice must also be served, having regard to the nature of the offence, the character and circumstances of the offender. The sentence must also be a deterrent not only to applicant himself but to others like him. It was in the public interest and in the interest of justice that the sentence was passed after having considered all those factors.

An award of different sentence for the same offence according to the circumstances of each case does not infringe the principle of equality before the law. See — *State of Punjab* v. *Ajaib Singh.*[13] See also *Siba Prasad Moda* v. *State of Orissa.*[14]

As I have said earlier, the question proposed to be referred to the Federal Court would only serve the applicant's personal interest and for that reason leave is refused.

Leave refused.

Solicitors: *Reddi & Co.*

KANAGASABAPATHY v. NARSINGAM

[A.C.J. (Vohrah J.) May 19, 1978]

[Kuala Lumpur — Civil Appeal No. 36 of 1977]

Torts — Negligence — Failure to provide reasonably safe system of work — Fall from coconut tree — Volenti non fit injuria — Damages.

Labour Law — Master and servant — Toddy tapper falling from coconut tree — Failure to provide reasonably safe system of work — Damages.

The respondent who was employed by the appellant as a toddy tapper fell from a coconut tree and sustained injuries while engaged in the performance of his duties. The learned President of the Sessions Court found that the appellant was negligent in that he failed to provide a reasonably safe system of work and he awarded general damages of $6,500. The appellant appealed and on the appeal it was argued *inter alia* that the doctrine of *volenti non fit injuria* was applicable.

Held: (1) although the appellant was aware of the risks he did not consent to them and therefore the doctrine of *volenti non fit injuria* could not be applied;

(2) the learned President was correct in his finding that the appellant was negligent at common law as he had failed to provide a reasonably safe system of work for the respondent.

Cases referred to:-

(1) *Drummond* v. *British Building Cleaners Ltd.* [1954] 3 All E.R. 507.

(2) *General Cleaning Contractors, Ltd.* v. *Christmas* [1953] A.C. 180.

(3) *Monaghan* v. *W.H. Rhodes & Son* [1920] 1 K.B. 487.

(4) *Smith* v. *Baker* [1891] A.C. 325, 362.

CIVIL APPEAL.

G.T. Rajan for the appellant.

R.K. Nathan (*S. Kanagasabathi* with him) for the respondent.

Cur. Adv. Vult.

Vohrah J.: This is an appeal against the decision of the Special Sessions Court, Kuala Lumpur awarding damages in an action for negligence.

The action was brought by the respondent who was employed by the appellant as a toddy tapper. On January 13, 1973 the respondent whilst engaged in the performance of his duties as a toddy tapper fell from a coconut tree and sustained injuries. He claimed damages for these injuries which, he alleged, were sustained solely as a result of the negligence of the appellant.

The facts of the case appear to be as follows. The respondent had been an employee of the appellant since 1971. In the ordinary pursuit of his employment as a toddy tapper he tapped an average of 25 coconut trees twice daily. In order to tap each tree he had to climb it by way of steps cut into its trunk. On reaching the top of the tree he would stretch out a hand to grasp the foliage in order to haul himself up towards the crown of the trunk whereafter he would pour the toddy, already collected there in a pot attached to the spathe, into a container tied around his waist and then make his descent. Prior to the accident the respondent had on more than one occasion complained to the appellant of the slipperiness of the steps. His last complaint was made about one month before his fall. On this occasion he claimed he informed the appellant that the steps were slippery

as a result of mossy growth and that, it being the rainy season, it would be difficult to climb if the steps were not cleaned. Toddy tappers in Malaysia climb coconut trees barefoot and no safety belts or other devices are provided or used as was the case here. As a result of his fall, the respondent sustained a fracture of the right 7th and 8th ribs and a fracture of a pelvic bone, the right ischium, and was hospitalized for a period of 27 days from January 13 to February 9, 1973. The respondent claimed that he was paid $7.20 per day but admitted that there was a verbal agreement for him to receive a monthly salary of $120 although he claimed that he was paid more for extra work. However, the appellant's labour register (Exhibit D1) indicated that he was paid $120 per month from which was deducted a monthly contribution of $6 towards the Employees' Provident Fund.

The learned President came to the following conclusions:

1. The cause of the respondent's fall was that the steps of the coconut tree he was climbing were slippery not having been properly cleaned. As a result his feet slipped.
2. The appellant's failure to ensure that the steps were properly cleaned amounted to negligence on his part.
3. There was no contributory negligence on the part of the respondent.
4. The defence of *volenti non fit injuria* did not apply on the facts of the case.

The learned President awarded general damages of $6,500, special damages of $240 and costs.

The appellant appealed against the whole of the learned President's decision and the memorandum of appeal put forward nine grounds. These were not dealt with individually by counsel for the appellant although he indicated that he was proceeding with all the nine grounds. The language of the memorandum was imprecise leaving much to be desired but as far as I could perceive the grounds were as follows:

1. The decision that the appellant was negligent and solely responsible for the accident was wrong in law and in fact.
2. The doctrine of *volenti non fit injuria* was applicable in this case since the respondent although fully aware of the danger involved in climbing the tree nevertheless proceeded to climb.
3. The appellant had not deviated from the usual practice of toddy tapping in Malaysia and could not be expected to devise a safer system.
4. There was insufficient evidence to support the finding that the respondent sustained his injuries as a result of the alleged fall because the injuries were not consistent with such a fall.
5. The finding that there was no contributory negligence on the part of the respondent was wrong in view of the respondent's admission that he knew that moss collected on the steps of the trees on rainy days.
6. The court failed to take into consideration the respondent's admission that he knew the steps had not been cleaned since 1972 and still omitted to take any precautions.
7. The court failed to consider the unlikelihood of the accrual of moss, mud or slime on the steps of the tree in view of their frequent use.
8. The court failed to consider the degree of the respondent's own negligence and responsibility for the accident and hence the amount of damages awarded was unreasonable and should have been reduced.
9. The decision of the court was contrary to the weight of the evidence.

I now come to the various points which have been raised by way of grounds of appeal. The first ground is a general ground and I do not need to deal with it specifically.

The second ground in my view is co-extensive with the sixth ground and relates to the defence of *volenti non fit injuria*. This defence was not pleaded albeit raised somewhat faintly in the submission in the lower court. Although there was no necessity for him to do so, the learned President considered this question specifically and meticulously and came to the conclusion that the appellant could not avail himself of this defence on the facts. With this conclusion I am in full agreement. The application of the legal principles as enunciated in *Drummond* v. *British Building Cleaners, Ltd.*,[1] *General Cleaning Contractors Ltd.* v. *Christmas*[2] and *Monaghan* v. *W.H. Rhodes & Son*[3] to the facts as revealed in this case was in my view correct. On the evidence it was clear that the respondent was aware and conscious of the risk to his personal safety. However, the maxim is not *scienti non fit injuria* but *volenti non fit injuria*. For the defence to succeed the appellant would have had to establish not only that the plaintiff consciously undertook the risk of actual injury to himself but that he consented to the risk of actual injury to himself for which he would have no legal redress. It will not be out of place here to quote Lord Herschell in the House of Lords case of *Smith* v. *Baker*[4] at page 362:

> "Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim *'volenti non fit injuria,'* applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong."

This is exactly what the appellant had sought to do in this case and accordingly the arguments put forward in his favour on the basis of this maxim must necessarily fail.

The third ground was obviously raised as a result of the learned President's holding that "employers in the toddy tapping industry should devise a man-made safety device with reference to the toddy tapping stage appropriate to the circumstances and requirements of the toddy tapping industry." It is pertinent to note that the learned President himself stated in his decision that it was not necessary to determine this question. I agree with his statement. He had at that stage already found that the appellant was negligent

at common law, having failed to provide "a proper appliance namely a tree trunk with properly cleaned steps" resulting in the respondent slipping and falling. In other words, the appellant had failed to provide a reasonably safe system of work for the respondent. As Lord Tucker pointed out in *General Cleaning Contractors, Ltd.* v. *Christmas, supra,* at page 198:

"... it is eminently desirable before condemning a system in general use that it should be clearly established by evidence that some other and safer system is reasonably practicable and that its adoption would have obviated the particular accident which has occasioned damage to the plaintiff."

I am of the view that these words are applicable to the present case. I consider that the evidence before the learned President was quite inadequate to establish that the method of toddy tapping generally practised in this country is, to borrow the words of Lord Reid at page 192 in *General Cleaning Contractors Ltd.* v. *Christmas, supra,* "so inherently dangerous that it cannot be made reasonably safe by taking proper precautions." Equally in my view there was no evidence before the court below to lead to the conclusion that any man-made safety device would prove to be a reasonably practical alternative. In fact the only suggestion as to the form such a device might take is that of the learned President himself. In the result there was no justification for his holding that employers in the toddy tapping industry are under a duty to contrive a man-made safety device of whatever nature.

I now come to the fourth ground of appeal. Counsel for the appellant conceded that the respondent fell from a coconut tree but disputed which part of the tree he fell from. There was certainly the direct evidence of the respondent himself to the effect that he fell from the top of the tree and the learned President appears to have accepted this. This ground relates to the question of the credibility of the respondent. The learned President found that on the day in question the respondent fell from a height of fifty feet because his feet slipped from an uncleaned step in the tree which had not been maintained in a proper condition. He also found that the injuries sustained by the respondent falling from such a great height were "relatively minor" because the fall had been cushioned by the pelvis of the respondent. I do not think it incumbent upon me to interfere with the learned President's finding on this score. He had the advantage of hearing and observing the respondent on the stand and had therefore a far better opportunity than I could possibly have of assessing his credibility. In any event, whether he fell from the top of the tree or from some other part of it, the learned President was clearly satisfied that his injuries were sustained as a result of his fall from the tree which fall was in turn occasioned by the uncleaned state of the steps.

With regard to the fifth ground relating to contributory negligence, I consider that there is no merit whatsoever in this ground. The cause of the fall was clearly the uncleaned state of the steps. By no stretch of the imagination can it be said that the respondent's knowledge of the risk of moss collecting on the steps on rainy days formed any part of the cause of the fall.

I propose to say nothing further on the sixth ground as I have dealt with it in conjunction with the second ground.

As to the seventh ground I am of the view that there was sufficient evidence before the learned President on which to arrive at his finding. It is clear from his decision that he gave this question full consideration and I do not consider interference with his finding in any way justified.

The eighth ground relates to the quantum of general damages. Since there was no contributory negligence no reduction is called for on this. Whilst I am of the view that this figure is slightly on the generous side, I do not consider it to be sufficiently out of line with the trend of comparable cases to warrant my interference bearing in mind that the authorities relied upon by the learned President were cases decided in 1965 and 1968 and that the decision was given in 1975.

In the light of what I have said above I find no merit in the ninth ground.

This appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.; R.K. Nathan & Co.*

CHUA HAN MOW v. SUPERINTENDENT OF PUDU PRISON

[O.C.J. (Syed Othman F.J.) November 6, 1978]
[Kuala Lumpur — Originating Applications Nos. 16 and 17 of 1978]

Administrative Law — Habeas Corpus — Applicant detained on extradition warrants — Validity of committal — Legality of committal warrants — Form of warrant — Mistake in form of warrant — Curable — Criminal Procedure Code (F.M.S. Cap. 6), ss. 366 and 422 — Extradition Ordinance, 1958, ss. 3, 3A, 5, 8, 9, 10, 11 and 14.

International Law — Extradition — Validity of committal — Legality of committal warrants — Conditions for extradition — Function of court — Surrender a matter for the Minister — Procedure to be followed by court in committal proceedings — Prima facie case — Evidence of accomplice and of agent provocateur — Form of warrant — Mistake in form of warrant curable — Criminal Procedure Code (F.M.S. Cap. 6), ss. 366 and 422 — Fugitive Criminals (Special) Extradition Act, 1977 — Extradition Ordinance, 1958, ss. 3, 3A, 5, 8, 9, 10, 11 and 14.

Criminal Law and Procedure — Habeas Corpus — Form of warrant for extradition — Mistake in form of warrant curable — Criminal Procedure Code (F.M.S. Cap. 6), s. 422.

Constitutional Law — Retrospective legislation — Procedure for extradition — Extradition Ordinance, 1958, s. 3A — Federal Constitution, art. 7(1).

Constitutional Law — Protection against retrospective criminal laws — Federal Constitution, art. 7(1).

The applicant applied for the issue of writs of *habeas corpus* to determine the legality of his detention in orders issued by the learned Presidents of the Sessions Courts for his extradition to the United States of America. The points raised on the application related to (a) the legality of the decision of the committal courts and (b) the legality of the committal warrants issued by the committal courts.

Held: (1) section 3A of the Extradition Ordinance (introduced by the Fugitive Criminals (Special) Extradition Act, 1977) gives the Minister an *ad hoc* power to deal with cases